No. 93-1959

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STEVEN KROUSE,
Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the District of Columbia

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT IN REPLY

I. THE DISTRICT OF COLUMBIA COURT OF APPEALS HAS EVISCERATED THE CONTINUING VIOLATION RULE AND RENDERED IT A NULLITY UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT (FELA) IN THE DISTRICT OF COLUMBIA.

By its decision in *National R.R. Passenger Corp. v. Krouse*, 627 A.2d 489 (D.C. 1993), the District of Columbia Court of Appeals has side-stepped applicable federal law and exceeded its authority. Respondent encourages the Court to allow the appellate court's decision to stand. The Court must decline.

The cases principally relied upon by the District of Columbia Court of Appeals do not apply to the case at bar. *See, e.g., Albert v. Maine Cent. R. Co.*, 905 F.2d 541 (1st Cir. 1990); *Fries v. Chicago & N.W. Transp. Co.*, 909 F.2d 1092 (7th Cir. 1990); *Dubose v. Kansas City S.Ry. Co.*, 729 F.2d 1028 (5th Cir. 1984), *cert. denied*, 469 U.S. 854, 105 S.Ct. 179, 83 L.Ed.2d 113 (1984). These cases have nothing to do with, and do not pretend to determine when the statute of limitations with respect to FELA actions based on the continuing violation rule commences to run.

First, the facts of these cases do not give rise to a continuing violation. Second, in these cases, neither party argued nor contended that the claims asserted constituted a continuing violation. Third, the courts in these cases did not *sua sponte* address the applicability of the continuing violation rule in reaching their conclusions.[1]

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[1] Respondents also cites *Bealer v. Missouri Pac. R.R.*, 951 F.2d 38, 39 (5th Cir. 1991); *Frasure v. Pennsylvania R. Co.*, 782 F. Supp. 477, 480-81 (C.D.Cal. 1991); *Ricard v. Elgin, Joliet & Eastern Ry. Co.*, 750 F.Supp. 372, 374-75 (N.D.Ind. 1990); *Roesch v. Chicago & N.W. Transp. Co.*, 1991 WL 183856 pp. 2-3 (N.D. Ill. Sept. 16, 1991); *Meier v. Chicago & N.W. Transp. Co.*, 1991 WL 49620 p. 2 (N.D. Ill. April 2, 1991); *Townley v. Norfolk & W. Ry.*, 887 F.2d 498, 501 (4th Cir. 1989); *Alexander v. Missouri Pac. R.R.*, 827 S.W.2d 757 (Mo.App. 1992). (Respondent's Brief p. 10). Although Respondent argues that these FELA cases "necessarily involve alleged continuing torts by defendants," (Respondent's Brief p. 10), the applicability of the continuing violation rule was only at issue in *Ricard, infra*, and *Alexander*. (In *Alexander*, the Missouri Court of Appeals ruled that plaintiff's reliance on *Fletcher v. Union Pac. Ry. Co.*, 621 F.2d 902 (8th Cir. 1980), *cert. denied*, 101 S.Ct. 918 (1981), in which the eighth circuit court held that the FELA statute of limitations for a continuing tort did not begin to run until defendant's tortious conduct ceased, was misplaced as plaintiff's negligent assignment claim was not comparable to the plaintiff's in *Fletcher*. *Alexander*, 827 S.W.2d at 758). Moreover, in those FELA cases in which the court specifically rejected the continuing violation rule, *see Ricard*, 750 F.Supp. at 375; *Courtney v. Union Pac. R. Co.*, 713 F.Supp. 305, 309-10 (E.D. Ark. 1989); *Stokes v. Union Pacific R. Co.*, 687 F.Supp. 552, 668 (D.Wyo. 1988);

These cases discussed the discovery rule. The courts in these *occupational disease* cases stated that when the FELA three year statute of limitations period commenced turned on when the plaintiffs were aware of their injury and its cause. Accordingly, the discovery rules of *United States v. Kubrick*, 444 U.S. 111 (1979) and *Urie v. Thompson*, 337 U.S. 163 (1949), emanating from cases which did *not* involve claims based on continuing tortious conduct (*Kubrick* being a medical malpractice case and *Urie* a latent injury case), governed these cases.

In relying upon this line of decisions, the District of Columbia Court of Appeals has chosen to ignore decisions which are directly on point. *Fowkes v. Pennsylvania R.R. Co.*, 264 F.2d 397 (3d Cir. 1959), *Fletcher v. Union Pac. Ry. Co.*, 621 F.2d 902 (8th Cir. 1980), *cert. denied*, 101 S.Ct. 918 (1981), and *Kitchline v. Consolidated Rail Corp.*, 800 F.2d 356 (3d Cir. 1986), are the *only* federal circuit deciisons which analyze the continuing violation rule under FELA. None of these decisions support the conclusion reached by the District of Columbia Court of Appeals. On the contrary, each of these decisions require that the judgment of the trial court be affirmed because Petitioner's claim was properly made within the statutory period.

Fowkes v. Pennsylvania R.R. Co., supra, and *Fletcher v. Union Pac. Ry. Co., supra*, held that the statute of limitations for a continuing tort does not begin to run until the tortious conduct ceases.[2] Applying these holdings, Krouse's statute did not expire until January 1992,

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Johnson v. Norfolk & W. Ry. Co., 836 S.W.2d 83, 85 (Mo.App.E.D. 1992), the evidence did not demonstrate continuous tortious conduct. (Respondent's Brief pp. 10-11; *see also* Petitioner's Brief pp. 6-7 note 4).

[2] In *Fletcher*, the court explicitly distinguished between a negligent assignment claim and a claim based upon industrial disease. *Fletcher*, 621 F.2d at 907-08, holding that the (*Urie*) discovery rule did not apply in the latter situation. *Id.* at 906-08.

three years after he left Amtrak.[3] The *Kitchline* court opined that the cause of action accrues for a continuous tort under FELA when the party knew or should have known that he suffered harm. However, the *Kitchline* court, in ruling that the continuing violation rule was inapplicable to plaintiff's claim, pointed out that plaintiff did not make out a claim for negligent assignment—plaintiff neither presented evidence that he notified his supervisor of his condition nor did he request reassignment—citing *Emmons v. Southern Pacific Transp. Co.*, 701 F.2d 1112 (5th Cir. 1983) and *Fletcher* (cases in which the courts held that the continuing violation rule applied to negligent assignment claims).[4] *Kitchline v. Consolidated Rail Corp.*, 800 F.2d at 358-59. Even so, the *Kitchline* Court recognized that any harm resulting from continuous conduct, which happened during the three year period before that filing of the complaint was properly before the court and timely. *Id.* And unlike the lower court in *Kitchline,* the District of Columbia trial court found that Petitioner *had* presented evidence to support continuous negligence and repeated trauma following injury, hence, an action for negligent assignment—1) Krouse continuously complained to his supervisor, and 2) Krouse's supervisors kept assigning him to work which aggravated his condition.

Under the guise of protecting Respondent from stale claims, the District of Columbia Court of Appeals erroneously applied the discovery rule to a scenario properly governed by the continuing violation rule. By its decision, the District of Columbia Court of Appeals has granted Amtrak, in Washington, D.C., the license to engage in tortious conduct continuously without reprisal. By its de-

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[3] As Petitioner filed his claim in March 1990, his claim was not barred by FELA's three-year limitations period.

[4] In Part I of his argument Petitioner pointed out that in *Emmons v. Southern Pacific Transp. Co.*, 701 F.2d 1112, 1120-21 (5th Cir. 1983), the court recognized that the continuing violation rule applied to claims for negligent assignment. Pet. Br. pp. 8-9.

cision, the Court has ignored and capriciously side stepped the very essence of the continuing violation rule: As long as the wrongdoer does harm, each new wrong causes the statute of limitations to begin anew.

This is not a new concept. This Court [6] and federal circuits have repeatedly recognized the viabilty of the continuing violation rule. The question of the applicability of the continuing violation rule has arisen in a variety of contexts in the District of Columbia circuit. *See e.g., Whelan v. Abell,* 953 F.2d 663 (D.C. Cir. 1992), *certiorari denied, Toomey v. Whelan,* 113 S.Ct. 300, 121 L.Ed.2d 223, *on remand* 1993 WL 141073 (continuous tortious interference with business opportunities); *Beatty v. Washington Metropolitan Area Transit Authority,* 860 F.2d 1117 (D.C. Cir. 1988) (continuing nuisance); *Page v. United States,* 729 F.2d 818 (D.C. Cir. 1984) (continuous medical malpractice); *Macklin v. Spector Freight Systems, Inc.,* 478 F.2d 979 (D.C. Cir. 1973) (continuous discriminatory practices); *Underwater Storage Inc.,* 371 F.2d 950 (D.C. Cir. 1966), *certiorari denied,* 87 S.Ct. 859, 386 U.S. 911, 17 L.Ed.2d 794, *on remand,* 314 F.Supp. 546 (continuing use of trade secret). The continuing violation rule is recognized in other circuits. *See, e.g., Santiago v. Lykes Bros. S.C. Co., Inc.,* 986 F.2d 423 (11th Cir. 1993) (Jones Act case involving continuous exposure to loud noises resulting in hearing loss); *Robinson v. Maruffi,* 895 F.2d 649 (10th Cir. 1990) (continuing malicious prosecution conspiracy); *Gross v. United States,* 676 F.2d 295 (8th Cir. 1982) (continuing violation of federal (ASCS) regulations); *Leonhard v. United States,* 633 F.2d 599, 613 (2d Cir. 1980), *certiorari denied,* 451 U.S. 908, 101 S.Ct. 1975, 68 L.Ed.2d 295 (1981) (continuing violation of constitutional rights); *Fletcher v. Union Pac. R.R., supra,* 621 F.2d at 907-08; *Donaldson v. O'Connor,* 493 F.2d

[6] *See,* Petitioner's Brief p. 7, citing, *Havens Realty Corp. v. Coleman,* 455 U.S. at 363 (1982); *Hanover Shoe v. United Shoe Mach. Corp.,* 392 U.S. 481 (1968).

507, 529 (5th Cir. 1974), *vacated on other grounds,* 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975) (continuing deprivation of constitutional rights); *Fowkes v. Pennsylvania R.R., supra,* 264 F.2d at 397; *Lavelle v. Listi,* 611 F.2d 1129, 1132 (5th Cir. 1980). Thus, the District of Columbia Court of Appeals not only ignored controlling federal substantive law, but also failed to adhere to D.C. precedent.

II. THE DECISION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS REPRESENTS AN EXERCISE OF JUDICIAL ABUSE OF POWER.

Having recognized that the evidence presented a continuing violation,[6] the District of Columbia Court of Appeals refused to follow and apply the continuing violation rule. In doing so, the District of Columbia Court of Appeals erred and committed a manifest injustice. Thus, by its ruling in *National R.R. Passenger Corp. v. Krouse, supra,* 627 A.2d 489, the District of Columbia Court of Appeals has forever foreclosed the right of the railroad workers to assert the continuing violation rule in the District of Columbia. This is wrong. It contravenes the most analogous and applicable federal common law.

At its core, the issue presented by Petitioner in Part I of its argument: *Whether the District Court of Appeals violated the mandate of this Court in Monessen Southwestern R. Co. v. Morgan,* 486 U.S. 330 (1988) *requiring state courts to apply federal substantive common law in adjudicating FELA claims,* is one of power. The decision of the District of Columbia Court of Appeals represents an exercise of judicial hubris and an abuse of power. The court below took great pains to avoid applying appropriate federal substantive law.

Much of the court's opinion is devoted to explaining why it chose *not* to follow federal precedent respect-

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[6] *Krouse, supra,* 627 A.2d at 495.

ing the continuing violation rule under FELA. However, the District of Columbia Court of Appeals, the equivalent of a state Supreme Court, does not have the power or authority to disregard the commands of the federal common law interpreting FELA. *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988); *St Louis Southwestern R. Co. v. Dickerson*, 470 U.S. 409, 411, 84 L.Ed.2d 303, 105 S. Ct. 1347 (1985) (*per curiam*); *Chesapeake & Ohio R. Co. v. Kuhn*, 284 U.S. 44, 46-47, 76 L.Ed. 157, 52 S. Ct. 45 (1931). At issue before the Court now is: *Whether the United States Supreme Court will allow the District of Columbia Court of Appeals to act so capriciously with complete disregard for federal common law which is squarely on point?*

To reach a result which it favored, at the urging of Respondent, the lower court misapplied the law. The lower court's rationale is illogical and inconsistent with its finding that negligent assignment is a continuing tort. *Krouse, supra*, 627 A.2d at 495 (citing *Fogg v. National R.R. Passenger Corp.*, 585 A.2d 786, 789 (D.C. 1991). This Court must not let this decision stand.

CONCLUSION

The Court should reverse *National R.R. Passenger Corp. v. Krouse*, 627 A.2d 489 (D.C. 1993).

Respectfully submitted,

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